

the public and avoids inefficient spectrum use, while allowing licensees to develop private applications. The Commission could, and perhaps should, consistent with this structure, mandate a threshold level of commercial mobile service to be provided by both narrowband and broadband PCS licensees - and this level must be high enough to ensure that the greatest part of the spectrum is available for public use.

It follows that a PCS provider should not be allowed to change the nature of the service it provides, because it should not be allowed to cease using the spectrum for an overwhelmingly commercial purpose. However, if the licensee chooses to begin or discontinue provision of a sideline private service, it should be allowed to do so, so long as its commercial operations are not affected or diminished.

A PCS licensee should be required to comply with the requirements of commercial services under section 332 of the Communications Act in all instances unless it can demonstrate that a particular section of Title II that would otherwise apply to it should not apply to its severable private sideline service. If the obligations in question cannot be segregated, the licensee will be subject to commercial regulation. For example, a sideline private service need not be offered to the public at non-discriminatory rates, unless the licensee

Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service.

commingles the two services in a way that the rates cannot be separated. If the licensee is bundling together as a package for certain subscribers a commercial and a private service, the entire offering must be regulated as commercial. The easiest distinction is whether the sideline private service is being used wholly for internal or governmental purposes. Once a "private" service on a PCS spectrum is offered to subscribers of any class, its nature becomes less clear and again should be subject to commercial regulation.

F. Restrictions On Dispatch Over Commercial Frequencies And On SMR/EMSP Licenses Should Be Abandoned

1. *SMR/EMSP Licenses*

As stated in SBC's Comments filed in Docket 93-144,¹² the SMR systems of today, particularly the wide-area EMSP systems proposed by the Commission, must be regulated on a par with cellular (and other commercial mobile service) providers. These systems now fall within the definition of commercial mobile services, and such classification will take the wireless market a long way down the road to regulatory parity. However, the eligibility restrictions on SMR licenses in Section 90.603(c) of the Commission's rules that prohibit wireline telephone common carriers from receiving a license under Subpart S of Part 90 remain a stumbling block to

¹² SBC's EMSP Comments at p.3. SBC incorporates its EMSP Comments herein by reference.

competition and true parity.¹³ Wireline telephone common carriers¹⁴ are the only entities excluded in this manner, and the time has come for the Commission to remove this stumbling block.

Local exchange carriers and their cellular affiliates should not be prohibited from receiving either traditional SMR licenses or the proposed EMSP licenses. All of the Commission's goals -- development of innovative wide-area SMR operations, efficient use of spectrum, and diversity of mobile communications services -- will be more readily accomplished if it allows some of the most experienced and efficient wireless operators to participate in the process. The key to innovative competitive wireless services is regulatory parity among the various types and operators of such services.

The SMR and EMSP public would be served by a wide choice of carriers vying for their business with an array of innovative and customized applications. No cogent reason for initial implementation of a Rule prohibiting participation by wireline common carriers in SMR services ever existed, and in

¹³47 C.F.R. § 90.603(c).

¹⁴Common carriers have assumed that the wireless affiliates of wireline telephone companies (such as Metromedia Paging Services and Southwestern Bell Mobile Systems) are included within that prohibition regardless of the locations in which the wireless affiliate is conducting business. The rule itself only addresses wireline "telephone" common carriers, however, thus addressing only the LECS. If, in fact, the Commission does not view affiliates of telephone common carriers to be excluded by section 90.603(c), SBC requests that it clarify that position.

light of the practical experiences of wireline common carrier affiliates in the cellular industry, none can reasonably be claimed to exist now.¹⁵

Experience indicates that purchasers of SMR services are interested in efficient and effective service, and not in whether their carrier is "wireline" or not. Commission policy, both in the past and as is being formulated in Docket

¹⁵In the Commission's PR Docket No. 86-3, In the Matter of Amendment of Part 90 of the Commissions' Rules Governing Eligibility for the Specialized Mobile Radio Services in 800 MHz Land Mobile Band ("SMR Eligibility Docket"), the Commission initially proposed to eliminate the wireline restriction on the ground that this change would make available more efficient service to the public by enhancing competition. The Commission observed in that NPRM that elimination of the restriction would create an unregulated, competitive marketplace environment for the development of telecommunications. The Commission went so far as to admit that the origin of the wireline restriction was never explicitly discussed either in the Docket imposing it or in any subsequent proceedings. (Order Terminating Proceeding, PR Docket No. 86-3, released July 15, 1992, ¶ 2.) Thus, contrary to statute and the most basic principles of administrative law, the wireline restriction was imposed and remains in place without the required public interest determination even being discussed, much less made.

Later, in PR Docket No. 92-235, In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, the Commission proposed a new Rule 88.17 that would provide that in the 220-222 MHz, 806-821-851-866 and 896-901-935-940 MHz bands, wireline telephone common carriers would be restricted to holding a noncontrolling interest in any specialized mobile radio system. SBC flatly opposes any continued limitation on the ability of LECs and their cellular affiliates to hold SMR or EMSP licenses. No authority for or public interest showing has been or can be made to support this restriction. Accordingly, any restriction on the eligibility of licensees, particularly that which would prohibit qualified and financially secure providers of SMR service, should be abandoned. SBC refers to and incorporates herein its Comments, filed May 28, 1993, in Docket No. 92-235.

93-144, permits and encourages SMR operations to become multi-service generalized mobile providers to an unlimited class of users. This is far different from the specialized end user oriented service originally contemplated when SMR service was introduced and the wireline limitation imposed. Wireline carriers and their affiliates can bring to the SMR and EMSP business the marketing, technical, and implementation expertise necessary to serve this expanding and demanding market segment.

Companies as large and sophisticated as Nextel, AT&T and large cellular common carriers like McCaw Cellular are currently eligible for SMR and EMSP licenses. It is an arbitrary and unreasonably discriminatory rule that would permit one type of large cellular carrier (such as McCaw,¹⁶ the nation's largest cellular provider) to expand the variety and geographic scope of its wireless services while restricting another type of cellular carrier (such as SBMS) from enjoying those same competitive advantages. If EMSP licensees become true competitors to cellular, as the Commission and SBC believe they will, there is absolutely no defensible reason for permitting some but not all existing

¹⁶McCaw Communications and its affiliates constitute the largest cellular carrier in the United States today, yet the Commission does not propose to limit in any way its participation in the EMSP licensing process. Obviously neither size nor ownership of existing wireless networks are considerations in fashioning any prohibition on participation in SMR licenses, and affiliation with a wireline telephone common carrier should be similarly disregarded.

wireless providers from participating in that new service. Not only does it prohibit companies like SBMS from providing the new services and competing in the new market, but it will severely competitively handicap them in the existing cellular markets to which they are being confined.

2. *Dispatch Services On "Common Carrier Frequencies"*

In light of the reclassification of certain previously private services and of the proposed permissive use of commercial spectrum for sideline private uses, the Commission can and should terminate the existing restriction on provision of dispatch services over common carrier frequencies. There is no justification for continuing either this restriction or the restriction on telephone common carriers obtaining SMR licenses. There is particularly no reason to retain it now in the face of this complete regulatory reorganization and the potential for mixed use of spectrum. The public interest will be served by allowing more providers, and hence more competition and lower prices to end users, in the market for dispatch services. There is no technical justification for continuing the prohibition on dispatch and eliminating the prohibition on dispatch would provide common carriers with greater flexibility to meet their customers' needs.

III. REGULATORY TREATMENT OF COMMERCIAL MOBILE SERVICES

A. The Commission Should Not Create Categories Of Commercial Mobile Services For Differing Regulatory Treatment

Although the Communications Act may now authorize the

Commission to create subcategories of commercial mobile services or carriers, there is no reason set forth on this record for actually doing so. The three groups that the Commission tentatively proposes are based on their preexisting regulatory status: common carrier; private; and none (PCS). NPRM ¶ 55. Although it is true that these three categories of services will ultimately comprise all or substantially all of the universe of commercial mobile services, it is not clear that it is either necessary or advisable to divide these into categories for purposes of differential regulation by the Commission. In line with simplifying and streamlining, SBC proposes that the Commission not create separate groupings of commercial mobile services.¹⁷ One of the goals in this proceeding is to create regulatory parity among these various services - not to perpetuate their differential treatment under a different verbal formulation. Hence, even though wide area SMR, for example, may have been previously classified under Part 90 as private, it is now properly classified as a commercial service and should be regulated on a par with other commercial mobile services rather than under different rules based solely on its previously private designation.

¹⁷One potential exception is the proposed AT&T/McCaw merged entity. If that merger is approved over SBC's objections, then it should be conditioned on certain restrictions that are tailored to mitigating the anticompetitive effects that would result from this behemoth's unique integrated control over manufacturing, long distance and wireless services. See discussion infra at pp. 34-35.

B. The Basic Guideline For Forbearance Should Be Competition As Evidenced By The Existence Of Two Or More Licensees In An Area

Regulation is only necessary to protect the public if competition does not exist in a particular market. Where competition exists, regulation is not necessary to protect consumers or to ensure that the charges and practices for or in connection with a service are just and reasonable and are not unjustly or unreasonably discriminatory. The primary consideration in evaluating whether competition exists in a wireless market is whether there are at least two commercial mobile service providers licensed to provide a similar service within a particular licensed area. With at least two competitors in the marketplace operating on an equal regulatory footing, natural market forces will work to ensure that rates are not unjust or unreasonable and the public interest will be well served.¹⁸

The experience in the cellular industry bears this out. Cellular carriers have engaged in vigorous competition and the public has been better served through such competition than it would have been had the Commission insisted that such carriers attempt to compete only on the basis of filed tariffs. The absence of rate and tariff regulation has allowed cellular carriers to engage in price competition and competitive

¹⁸An equal regulatory footing requires that each provider's license be granted on the basis of the same type of geographic units (e.g. MSA or MTA) for a comparable amount of spectrum and that they have the same build-out requirements and other regulatory obligations.

bidding; to provide service innovation; and to respond quickly to market trends. The clear beneficiaries of this flexibility has been the public. All indications for the future are that this competition will increase rather than decrease with the entry into the marketplace of additional personal communications services like SMR and PCS, which are very much like traditional cellular service.

Imposing traditional forms of monopoly tariff regulation on such an industry would have the perverse effect of forcing a carrier to do by regulation what it could not do on its own in the face of the antitrust laws -- namely, to pre-announce or signal rate changes to its competitors and to provide competitors a forum in which to discuss one another's rates.

C. The Commission Should Forbear From Regulating Commercial Mobile Services

SBC agrees with the Commission that competition in commercial mobile services is sufficient to permit it to forbear from tariff regulation of the rates for commercial mobile services provided to end users. NPRM ¶ 62.¹⁹ SBC

¹⁹Although the Commission incorporates by reference the record in the Petition for Rulemaking (RM 8179) filed by CTIA with respect to the dominant or nondominant classification of cellular carriers, it does not expressly state whether it will in this proceeding, resolve the CTIA petition. SBC requests clarification on this point since the Commission entered an order in connection with RM 8179 that extends until that proceeding is resolved. SBC requests that to avoid inconsistent regulation the Commission either declare cellular carriers to be non-dominant in this proceeding, or make clear that any references in its regulations to obligations of dominant or nondominant carriers no longer pertain in any way to providers of commercial mobile services.

incorporates herein by reference its Comments filed in both Docket 93-36 and in RM 8179. Given that there are already two cellular licensees in each market nationwide, the Commission should start from the point of forbearing from most forms of Title II regulation of cellular carriers and competing PCS and wide area SMR operators. The public interest will be further served by forbearance from Sections 203, 204, 205, 211 and 214 of Title II of the Communications Act for PCS and other commercial mobile service providers. NPRM ¶¶ 65-66. SBC concurs with the Commission's tentative conclusions in paragraphs 65-67 of the NPRM with respect to which sections of Title II it will forbear or not forbear from enforcing against commercial mobile service providers.

D. The Commission Should Not Mandate Interconnection Among Commercial Mobile Service Providers

SBC concurs with the Commission's tentative conclusion to preempt state regulation of the right to intrastate interconnection and the right to specify the type of interconnection. NPRM ¶ 71. However, at this time, the Commission should not require commercial mobile service providers to provide interconnection to other mobile service providers. Id. Part 22 providers are not the interconnectors and franchised local providers of last resort. Today the LECs are the only common carriers that are obligated to provide the

hub of local exchange telephone service,²⁰ and it is reasonable that the LECs should be required to provide mandatory interconnection to the new and various commercial mobile service providers.

The current telecommunications network is structured around centralized hubs - the landline LECs. So long as all carriers are allowed to interconnect to the one hub, any call placed on any network can reach any point on any other network and access the features and services of that network. This system has the enormous added benefit of simplicity of accounting for access charges, since all calls flow through a single central point and access charges are only assessed at that point. A system of mandatory interconnected networks that do not necessarily flow through the LEC (or more likely, flow through several switches, including the LEC's) will quickly evolve into a morass of access charges (and resultant higher prices and decreased service capabilities) and an accounting nightmare. Under that scenario multiple access charges could accrue on a single call even though the call is never actually completed, and carriers might end up having to absorb many of those unnecessary charges. There are also complex questions about the effect of multiple

²⁰The Commission should recognize, however, that at some point as the telecommunications industry continues to evolve and as new or alternative services provide service to increasing numbers of customers, it may need to revisit the traditional classification of the LEC as the interconnector of last resort.

interconnections on "calling party pays" (who pays what when there are multiple access charges?) and on Intelligent Network services (where does the call go and who pays for what?) Given these difficulties and the current ability of all services to interconnect through the PSTN, the Commission should not order any commercial mobile service provider to make available mandatory interconnection with any other commercial mobile service provider.²¹

E. Until All Commercial Mobile Service Providers Are Free Of Equal Access Obligations, All Providers Should Bear Those Obligations In The Interests Of Regulatory Parity

The purpose of this entire proceeding is to reshape the Commission's regulatory structure to afford commercial mobile service providers the opportunity to compete under the same set of rules. The Commission has requested comment on whether any or all classes of PCS providers should be subject to the obligation of providing equal access to interexchange carriers to their subscribers - one of the rules under which the cellular affiliates of the BOCs have had to operate. NPRM ¶ 71.

²¹Neither should the Commission prohibit such interconnection, however. In those instances where carriers reach mutual agreement about the types of interconnection that make sense in the marketplace and that can accommodate the system of access charges and "paying party" features desired by the affected carriers and their subscribers, then such interconnection will naturally occur and should not be prohibited. Examples already exist where the cellular carriers in a market have created direct connections for mobile to mobile calls that do not transverse the PSTN and therefore avoid LEC interconnection charges. This type of negotiated interconnection should continue to be allowed.

SBC favors the leveling of this playing field and the equalization of competitive opportunities by removing the equal access restrictions currently placed on BOC-affiliated cellular carriers. Accordingly, it has filed a generic mobile waiver request with the Department of Justice, seeking to have that restriction of the MFJ²² removed. SBC urges the Commission to support the efforts of SBMS and other BOC-affiliated carriers to obtain relief from the restrictions of Section II of the MFJ. In the meantime, however, disparate treatment of any commercial mobile services with respect to equal access does not make sense. BOC-affiliated cellular carriers operating outside of their telephone affiliate's service area on an A-band license look no different in an economic or competitive sense from any other provider of commercial mobile services. This is especially important when one considers that if BOCs acquire PCS licenses, many of them are likely to be acquired outside of their telephone subsidiaries' service areas. SBC urged in RM 8012²³ that the Commission's consideration of equal access obligations extend to services beyond traditional cellular service, to include

²²Modification of Final Judgment ("MFJ") entered on August 24, 1982, in the United States District Court for the District of Columbia in United States vs. Western Electric et al.; Civil Action No. 82-0192, 552 F. Supp. 131 (D.D.C. 1982).

²³In the Matter of Policies and Rules Pertaining to the Equal Access Obligations of Cellular Licensees; Comments filed by SBC on July 31, 1992. SBC hereby incorporates by reference its comments in that proceeding.

services such as ESMR and PCS. The Commission again has the opportunity to do precisely that.

Cellular providers not subject to the MFJ recognize that clustering (the acquisition of licenses in contiguous service areas and the efficient deployment of cellular switches within those areas) is the key to competitive advantage in the cellular industry, and they have rushed to assemble ever-broadening regional super systems.²⁴ Typically these providers charge their customers at a flat rate for calls made within all of a substantial part of a regional cluster. Id. at 158-60. McCaw, for example, offers its customers service throughout the state of Florida at a single "local" price. Id. at 158. Several other companies make similar offers of regional toll free service. Id. at 158-60.

BOC providers cannot offer regional services now, both because they cannot cross artificial LATA boundaries and because they bear equal access obligations. Under the MFJ, if a BOC cellular subscriber wants to make a long distance call, the BOC is required to hand that call off to the subscriber's presubscribed interexchange carrier ("PIC"). The subscriber is then billed at the PIC's retail rate for the long distance call and at the BOC's rate for the cellular air time. The BOC carriers cannot purchase interexchange services wholesale from one carrier and pass the resulting savings on to their

²⁴Report of the Bell Companies on Competition in Wireless Telecommunications Services, 1991 (October 31, 1991) pp. 98-116 (hereafter "Wireless Report").

subscribers in the form of reduced or even non-existent charges for long distance calls.

On the other hand, non-BOC carriers currently have that legal ability and hence a competitive edge. Because the cost of obtaining interexchange connections in bulk is comparatively low, cellular providers not subject to the interexchange and equal access restrictions of the MFJ can easily undercut the combined cellular and retail long distance charges that subscribers of a competing BOC have to pay. However, they need not pass on to their customers the full savings they can achieve because the BOCs are forced to provide access to interexchange services billed by interexchange carriers at full retail prices.

The pending merger of AT&T/McCaw and the unique dominant position that such an entity would acquire merit regulatory action by the Commission. On November 1, 1993, SBC filed with the Commission its Petition to Impose Conditions or, in the Alternative, to Deny, in File No. ENF 93-44; In the Matter of American Telephone and Telegraph Company and Craig O. McCaw, Applications to Transfer Control of Licenses Held by Subsidiaries and Affiliates of McCaw Cellular Communications, Inc. ("SBC Petition). If the merger is permitted to go through over SBC's objection, AT&T/McCaw's unfair regulatory and competitive advantages would be overwhelming. Accordingly, the Commission must at the very least impose conditions that would help mitigate the anticompetitive

effects of this merger. Certainly one of the conditions must be that each AT&T wireless service provider offer to all interexchange carriers exchange access and exchange services for such access on an unbundled basis, that is equal in type, quality and price to that provided to any interexchange service provided by AT&T or an affiliate thereof. Also, no AT&T wireless service provider should be allowed to bundle local and long distance wireless service together in a single package to sell to consumers.²⁵

Part of the Commission's mission is to foster competition and prevent any particular carrier from being able to utilize an unfair competitive advantage. It should exercise its authority in furtherance of that mission to remove the BOC-affiliated cellular carriers from the untenable position in which they find themselves, in which other wireless providers enjoy an unfair competitive advantage solely as a result of the regulatory environment within which they operate and not as a result of their own competitive efforts. Accordingly, the Commission should impose equal access obligations on providers of PCS and other commercial mobile services until

²⁵Other conditions should be imposed as well, including but not limited to, the imposition of the same structural separation requirements applicable to the BOCs; equal access to interconnection; nondiscrimination provisions regarding technical information, interconnection, new services, and equipment; and strict separation requirements preventing sharing of information between the entity's interexchange and wireless personnel regarding proprietary customer information obtained by either division about other interexchange companies or wireless service providers' subscribers or networks. See SBC Petition at pp. 73-83.

that day when all providers can be free of those obligations.

IV. CONCLUSION

Congress has provided the Commission with the framework and the authority to create a new regulatory structure for wireless services. The Commission ought to shape that structure to bring PCS and other commercial mobile services within a uniform regulatory environment that will foster increased competition through application of minimal regulation.

Respectfully submitted,

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